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PROCEEDINGS AND ORDERS

CASE NBR 84-1-06156 CFY
SHORT TITLE Cooper, Velma P.
VERSUS United States

DATE: 060385

DOCKETED: Jan 24 1985

Date	Proceedings and Orders
Jan 24 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Feb 26 1985	Order extending time to file response to petition until March 29, 1985.
Mar 7 1985	Record filed.
Mar 7 1985	Certified original record, 3 volumes, received.
Mar 29 1985	Order further extending time to file response to petition until April 29, 1985.
Apr 30 1985	Brief of respondent United States in opposition filed.
May 2 1985	VIDED.
May 2 1985	DISTRIBUTED. May 16, 1985
May 17 1985	REDISTRIBUTED. May 16, 1985
May 17 1985	REDISTRIBUTED. May 23, 1985
May 28 1985	REDISTRIBUTED. May 23, 1985
	Petition DENIED. Dissenting opinion by Justice White

CONTINUE {

PROCEEDINGS AND ORDERS

CASE NBR 84-1-06156 CFY
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May 28 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan and Justice Marshall join. (Detached opinion.)

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 84-6158

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VELMA P. COOPER,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID E. STANLEY
7341 Jefferson Highway, Suite J
Baton Rouge, Louisiana 70806
Telephone: (504) 926-9200

Court Appointed Attorney For Petitioner

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

VELMA P. COOPER

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND TO APPOINT COUNSEL

The petitioner, Velma P. Cooper, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner further asks that counsel be appointed to represent her in this matter before this Honorable Court. Petitioner has previously been granted leave to proceed in forma pauperis in both the United States District Court and the United States Court of Appeals and had counsel appointed to represent her in both courts.

Velma P. Cooper

Velma P. Cocper

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

VELMA P. COOPER

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ORDER

IT IS ORDERED that petitioner, Velma P. Coooper, be allowed to proceed in this matter in forma pauperis without prepayment of costs and filing fees and that _____ be appointed to represent petitioner in this Court.

_____
JUSTICE, UNITED STATES SUPREME COURT

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

VELMA P. COOPER

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

MOTION FOR LEAVE TO PROCEED PRO HAC VICE

The Motion of David E. Stanley, court appointed counsel for petitioner Velma P. Cooper, asks leave to enroll as counsel pro hac vice for purposes of the attached petition for writ of certiorari prepared by undersigned counsel on behalf of Velma P. Cooper. In support of his Motion For Leave To Proceed Pro Hac Vice, mover respectfully shows the Court that:

(1) He was admitted to practice before the Louisiana Supreme Court on October 7, 1983, a period of less than three years prior to submission of this Motion.

(2) Mover was previously appointed to represent petitioner, Velma P. Cooper, pursuant to the Criminal Justice Act of 1964 in both the United States District Court for the Middle District of Louisiana and the United States Court of Appeals for the Fifth Circuit.

(3) Mover affirms that, if allowed by this Court to proceed in this matter pro hac vice, that he will conduct himself uprightly and according to law, and that he will support the Constitution of the United States.

WHEREFORE, mover respectfully requests leave to enroll as counsel in this matter pro hac vice and, if permitted by this Court, to present oral argument pro hac in this cause.

By: /s/ David E. Stanley

David E. Stanley
7341 Jefferson Highway, Suite J
Baton Rouge, Louisiana 70806
Telephone: (504) 926-0200

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

VELMA P. COOPER

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ORDER

IT IS ORDERED that David E. Stanley be granted leave to proceed in this matter pro hac vice and that his name be enrolled herein as counsel of record for petitioner, Velma P. Cooper.

Washington, D. C., this ____ day of _____, 1985.

_____

JUSTICE, SUPREME COURT OF THE UNITED STATES

QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress, by simultaneously enacting 18 U.S.C. § 1512 and amending 18 U.S.C. § 1503 to delete all references to witnesses therein, intended that threats and intimidation directed at witnesses could henceforth be prosecuted only under 18 U.S.C. § 1512 and not under 18 U.S.C. § 1503.

2. Whether petitioner's conviction, even if statutorily valid under 18 U.S.C. § 1503, is supported by competent and legally sifficient evidence.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

VELMA COOPER,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Velma P. Cooper, respectfully prays that a writ of certiorari issue to review the correctness of the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 6, 1984.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit entered its decision affirming petitioner's conviction under 18 U.S.C. § 1503 on December 6, 1984. A copy of the decision is attached as Appendix A.

JURISDICTION

On December 6, 1984, the United States Court of Appeals for the Fifth Circuit entered a judgment which affirmed petitioner's conviction under 18 U.S.C. § 1503. (App. A). The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ..."

STATEMENT OF THE CASE

On November 9, 1983, a federal grand jury returned a four count superseding superseding indictment against Oscar Wesley and Velma P. Cooper. Count one of the indictment pertained only to Oscar Wesley and charged him with being in possession of a firearm while a convicted felon in violation of 18 U.S.C. § 1201(a)(1). Oscar Wesley and Velma P. Cooper were jointly charged in counts two, three and four of the superseding indictment with conspiracy, obstruction of the due administration of justice and tampering with a witness in violation of 18 U.S.C. § 371, 18 U.S.C. § 1503, 18 U.S.C. § 1512(a)(1) and 18 U.S.C. § 2, respectively.

Oscar Wesley and Velma P. Cooper were tried jointly before a jury on February 13 and 14, 1984. Velam P. Cooper was acquitted of conspiracy (i.e. 18 U.S.C. § 371) and tampering with a witness (i.e. 18 U.S.C. § 1512[a][1]). However, the jury convicted Velma P. Cooper of endeavoring to obstruct the due administration of justice in violation of 18 U.S.C. § 1503.

Thereafter, Velma Cooper appealed her conviction to the United States Court of Appeals for the Fifth Circuit on two grounds, to wit: (1) her conviction under 18 U.S.C. § 1503 is in valid because 18 U.S.C. § 1503, after its amendment effective October 14, 1982, no longer applies to statements or conduct involving witnesses, and (2) her conviction, even if statutorily valid under 18 U.S.C. § 1503, is not supported by competent and legally sufficient evidence. On December 6, 1984, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the conviction of Velma Cooper for violating 18 U.S.C. § 1503. United States v. Wesley, _____ F. 2d _____ (C.A. 5th Cir. - 1984).

REASON FOR GRANTING THE WRIT

Where Congress amends 18 U.S.C. § 1503 to delete all references to witnesses and simultaneously enacts a new statute, 18 U.S.C. § 1512, which deals specifically with threats and intimidation of witnesses, the double jeopardy clause of the Fifth Amendment to the United States Constitution prohibits a person from being tried under both statutes for a single incident involving a witness that occurred after the effective date of the new legislation.

The decision of the United States Court of Appeals for the Fifth Circuit in this case, United States v. Wesley, _____ F. 2d _____ (C.A. 5th Cir. 1984),creates a conflict between the Circuits because the United States Court of Appeals for the Second Circuit, the only other appellate court ruling on this issue to date, held in United States v. Hernandez, 730 F. 2d 895,899 (C.A. 2d Cir. - 1984) that:

> "... by enacting the Victim and Witness Protection Act in 1982, Congress intended that intimidation and harassment of witnesses should henceforth be prosecuted under § 1512 and no longer fall under § 1503." (emphasis added).

In the present case, Velma P. Cooper was tried under both 18 U.S.C. § 1512 and 18 U.S.C. § 1503. She was acquitted of violating 18 U.S.C. § 1512. Therefore, had she been residing within the territorial jurisdiction of the United States Court of Appeals for the Second Circuit, instead of the United States Court of Appeals for the Fifth Circuit, the holding of United States v. Hernandez, supra, would have made her conviction pursuant to 18 U.S.C. § 1503 impossible. Therefore, but for the state of her residence, Velma P. Cooper could not have been convicted of violating 18 U.S.C. § 1503 and, consequently, would not today have a felony criminal record. Further, viewing the evidence presented at the trial of this case in the light most favorable to the governmen Velma P. Cooper's conviction, even if constitutionally permissible, cannot stand because there was absolutely no evidence presented indicating that she corruptly, with knowledge and specific intent, endeavored to influence the due administration of justice. Velma P. Cooper's only "crime" was contacting a potential witness and asking that witness to come forward and testify truthfully.

The non-uniformity in the interpretation and application of 18 U.S.C. § 1503, a federal felony criminal offense, resulting from the conflicting interpretations given to both 18 U.S.C. § 1503 and the Victim and Witness Protection Act of 1982 by the Second Circuit and the Fifth Circuit, requires resolution by this Court. Additionally, construing the evidence in the light most favorable to the government, Velma P. Cooper's conviction for violating 18 U.S.C. § 1503, even if constitutionally permissible, is not supported by legally competent and sufficient evidence. Therefore, in the present case, the only proper disposition of this case for petitioner Velma P. Cooper is a vacation of her conviction and dismissal of Count III of the indictment against her. United States v. Hernandez, supra, at 899.

CONCLUSION

Based upon the violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution stated above, as well as the non-uniformity of the interpretation and application of a federal felony criminal statute resulting from the conflict between the Circuits, petitioner Velma P. Cooper respectfully requests that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Dated January 22, 1985

By: David E. Stanley

David E. Stanley
7341 Jefferson Highway, Suite J
Baton Rouge, Louisiana 70806
Telephone: (504) 926-0200

Appointed Counsel for Petitioner
Velma Cooper

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VELMA P. COOPER,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

DAVID E. STANLEY, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the written MOTION FOR LEAVE TO PROCEED PRO HAC VICE, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND TO APPOINT COUNSEL, and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, properly addressed to:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

and depositing same in the United States mail at Baton Rouge, Louisiana, on the 22 day of January, 1985.

David E. Stanley

David E. Stanley, Affiant

Sworn to and subscribed before me in my office in Baton Rouge, Louisiana,

this 22 day of January, 1985.

Notary Public In and For Said
Parish and State. My commission
is for life.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3287

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR W. WESLEY and
VELMA COOPER,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana

(December 6, 1984)

Before RUBIN, TATE, and HILL, Circuit Judges.

RUBIN, Circuit Judge:*

Oscar Wesley appeals from his conviction of possessing a firearm after having been convicted of a felony, influencing the due administration of justice, and tampering with a witness. His co-defendant, Velma Cooper, appeals from her conviction of obstructing the due administration of justice. We conclude that

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that rule the Court has determined that the non-precedential portions of this opinion should not be published. Parts of this opinion will publish in the Federal Reporter as of this date.

the defendants were properly charged under both 18 U.S.C. §§ 1503 and 1512, that § 1503 is applicable to obstruction of the administration of justice by attempts to influence witnesses and has not been superseded in this regard by § 1512, and that the evidence was sufficient to support their convictions. We therefore affirm on all counts.

I.

In January, 1982, Wesley pawned a .38 caliber revolver at the Airline Pawnshop in Baton Rouge, Louisiana, and signed the pawnshop receipt for the pawned gun. Approximately twenty-one months later, Wesley was charged with possessing a firearm after having been convicted of a felony. Wesley maintained that the gun he pawned belonged to his former step-daughter, Cheryl Berry, and that he signed the pawn ticket only at the request of the pawnshop owner because Berry was a minor.

On the evening of his arrest, Wesley phoned Velma Cooper, his living companion, from jail. Shortly after receiving this call, Cooper left her home, telling her daughter that she was going to "talk to Cheryl." Cooper arrived at Berry's home unannounced, and urged Berry to attend Wesley's bond hearing and corroborate Wesley's version of the facts. Berry insisted that Wesley's story was false, and refused to attend the hearing. Cooper then told her, "well, I just only telling you, you know,

what Oscar said . . . [and] Oscar said if you don't go, that he would be out there to talk to you." Berry thought Cooper was trying to scare her, and she considered Cooper's statement to be a threat. On the advice of both her mother and her husband, Berry did not report the threat to the police, but stayed at home with the doors locked. Angry that Berry did not attend the hearing, Cooper told a friend, "the little bitch will testify that it is her gun."

Wesley made bail, and was released approximately one week later. A special condition of his release was that he was not to intimidate or harass any witness. Nonetheless, the day after he was released, Wesley drove slowly past Berry's home, honking his horn; an action that could be viewed as an effort to let Berry know that he was out of jail.

Cooper and Wesley were indicted for conspiring to intimidate a witness, procure a witness to commit perjury, and obstruct justice; obstructing justice; and threatening a witness. Both defendants were acquitted on the conspiracy charge. Cooper was acquitted on the charge of threatening a witness, but convicted of obstructing justice. Wesley was convicted of being a felon in possession of a firearm, obstructing justice, and threatening a witness.

II.

Wesley argues that there is insufficient evidence to support his conviction for violating 18 U.S.C. § 1202 (Appendix). 1/

1/ 18 U.S.C. § 1202 (Appendix) provides in pertinent part:

> (a) Persons liable; penalties for violations. Any person who-
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony. . .
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act [enacted June 19, 1968], any firearm shall be fined not more than $10,000 or imprisoned for not more than two years or both.
>
> (c) Definitions. As used in this title-
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communications among the several States, or between the district of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country. . .
>
> (2) "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun.

Considering the evidence in the light most favorable to the government and construing all reasonable inferences to support the jury verdict, 2/ however, this argument cannot prevail.

2/ Glaser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Eiland, 741 F.2d 738, 741 (5th Cir. 1984).

In order to prove a violation of this section, the government must prove that: (1) the defendant had been convicted of a felony; (2) he was in possession of a firearm; and (3) the firearm was in, or affected, commerce. Here, the government introduced more than sufficient evidence for a reasonable jury to have found Wesley violated this statute.

First, it is uncontroverted that Wesley is a convicted felon. He was convicted of a felony by a Louisiana state court in 1969.

Next, Wesley was in possession of the revolver. The owner of the pawnshop testified that she received the revolver from Wesley, and the government introduced a pawn ticket for it signed by Wesley. Although Wesley contends that the revolver belonged to his former step-daughter, Berry, the government need not prove that he actually owned the gun. Mere possession is enough to convict. 3/

3/ United States v. Orozco, 715 F.2d 158, 161 (5th Cir. 1983). See United States v. Freeze, 707 F.2d 132, 135 (5th Cir. 1983).

A reasonable jury might also have found that the revolver Wesley pawned was a "firearm" within the statutory definition of § 1202(c)(3). The government introduced three witnesses on this point. The owner of the pawnshop, a federally licensed firearms dealer, who examined the revolver and found it to be in good working order; an agent of the Bureau of Alcohol, Tobacco and Firearms who examined the revolver and found it to be designed to expel a projectile by the action of an explosive; and the controller of the corporation that manufactured the gun who testified that the weapon was designed as a firearm. All of this evidence is uncontroverted, and is sufficient to establish this element of the offense. 4/

4/ United States v. Turner, 565 F.2d 539, 541 (8th Cir. 1977).

Finally, a reasonable jury might have found that the firearm in Wesley's possession was in, or affected, commerce. The controller of the corporation that manufactured the gun testified that the gun was made in Florida and shipped to Mississippi.

This was supported by an invoice, bill of lading and receipt. In order to prove that the firearm was in or affected commerce, the government need prove only that the gun was manufactured in one state and possessed in another. 5/ The time of the movement is irrelevant. 6/ Based on this evidence, and resolving any discrep-

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5/ United States v. Garrett, 583 F.2d 1381, 1389 (5th Cir. 1978).

6/ United States v. Goodie, 524 F.2d 515, 516-17 (5th Cir. 1975), cert. denied, 425 U.S. 905, 96 S.Ct. 1497, 47 L.Ed.2d 755 (1976).

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ancies in favor of the jury's verdict, the government proved the essential elements of this charge against Wesley.

III.

Count IV of the indictment charges Wesley with endeavoring to intimidate a witness, and with aiding and abetting Cooper in the endeavor in violation of 18 U.S.C. §§ 1512 and 2. Wesley presses two arguments on appeal: first, there is insufficient evidence to show that he actually intimidated the witness, and second, because Cooper was acquitted of intimidating the witness, he cannot be convicted as an aider and abettor for the same crime.

The evidence would allow the jury reasonably to infer that, as a result of Wesley's phone call, Cooper visited Berry and attempted to induce her to corroborate Wesley's version of the facts. In addition, the evidence of Wesley's conduct after he was released from jail might reasonably be construed as an attempt to let Berry know that he was no longer confined. These types of contact with the witness, although indirect, are sufficient for a jury to find Wesley guilty of intimidating the witness. 7/

7/ Cf. Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966) (defendant endeavored to impede the due administration of justice, in violation of 18 U.S.C. § 1503, by instructing an intermediary to bribe a prospective juror); United States v. Howard, 569 F.2d 1331 (5th Cir.), cert. denied sub. nom., Ritter v. United States, 439 U.S. 834, 99 S.Ct. 116, 58 L.Ed.2d 130 (1978) (obstruction of justice can be accomplished despite absence of contact between witness and defendant).

Wesley's argument that Cooper's acquittal of intimidating a witness exonerates him of guilt as an aider and abettor is beside the point. The indictment charged Wesley both as a principal and as an aider and abettor. The evidence was ample to sustain the verdict against him as the principal.

IV.

Finally, Wesley argues that his convictions under both 18 U.S.C. § 1503 (obstruction of justice) and 18 U.S.C. § 1512 (threatening a witness) are multiplicious and violative of the double jeopardy clause of the fifth amendment. He contends that, because Cheryl Berry was a potential witness and § 1512 explicitly proscribes threats against potential witnesses, he can be convicted only of violating § 1512, but not for obstructing the due administration of justice. This argument ignores the plain words of the statute and misinterprets the legislative history behind § 1512.

Before 1982, 18 U.S.C. § 1503 [8] was entitled "Influencing or

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8/ The pre-1982 version of 18 U.S.C. § 1503 provided as follows:

> Whoever corruptly, or by threats of force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his

> testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force or by any threatening letter of communication, influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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injuring officer, juror or witness generally," and it prohibited influencing or intimidating, "any witness . . . grand or petit juror, or [court] officer" in the discharge of his duty. The section also contained a residual clause prohibiting anyone from obstructing or attempting to obstruct the "due administration of justice." In 1982, Congress amended § 1503, and removed all references to witnesses. 9/ At the same time, it also enacted 18

9/ 18 U.S.C. § 1503 now provides as follows:

> Whoever corruptly, or by threats of force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the

discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats of force, or by any threatening letter of communication, influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both.

U.S.C. § 1512 which focuses solely on the protection of witnesses, informants and crime victims from intimidation. 10/ The

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10/ 18 U.S.C. § 1512 provides in pertinent part:

(a) Whoever knowingly uses intimidation or physical force, or threatens another person or attempts to do so, or engages in misleading conduct toward another person with intent to-

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to-

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(E) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $25,000 or imprisoned not more then ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents or dissuades any person from-

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

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safeguards afforded by § 1512 are both more extensive and more detailed than those given by § 1503. Congress did not, however, remove the residual clause of § 1503 in its 1982 amendments.

The Second Circuit in United States v. Hernandez, 11/ found that, "Congress affirmatively intended to remove witnesses entirely from the scope of § 1503," 12/ and held that witness

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11/ 730 F.2d 895 (2d Cir. 1984).

12/ Id. at 899.

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intimidation could be prosecuted only under § 1512 and not § 1503. The court compared the language of the pre-1982 and post-1982 versions of § 1503, and determined that any other conclusion would "defy common sense" and "run contrary to the legislative history of § 1512." 13/

13/ Id.

We disagree. By enacting § 1512 to address certain kinds of witness intimidation, and simultaneously deleting from § 1503 all references to witnesses, we find no indication that Congress intended that threats against witnesses would fall exclusively under § 1512 and were exempt from prosecution under § 1503. The

facts of this case provide a graphic example of the soundness of this conclusion. Count III of the indictment charges Wesley with obstructing justice in violation of § 1503, "by urging and advising" Cheryl Berry to testify falsely. If urging a witness to commit perjury is not prohibited by § 1512, and if witnesses have been removed entirely from the scope of § 1503, then the conduct with which Wesley is charged would violate neither section. There is simply no indication that, by enacting § 1512 to broaden the protection afforded witnesses, Congress intended to create such a gap in the statutory protection already available under § 1503.

This circuit has previously recognized the continued scope of § 1503 in United States v. Vesich, 14/ in which the court upheld

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14/ 724 F.2d 451 (5th Cir.), petition for reh'g denied, 726 F.2d 168 (1984).

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a conviction under the residual clause of § 1503 for advising a witness to perjure himself. The opinion applied the pre-1982 version of § 1503 in reaching its decision, but it particularly noted that, although the 1982 amendments "deleted all references to 'witness' in section 1503 and replaced them with separate statutory provisions," section 1512 "did not alter the 'due administration' clause of section 1503." 15/ The opinion

15/ Id. at 453-54 n.1.

further noted that, "[w]e have defined the term 'administration of justice' as including or consisting of 'the performance of acts required by law in the discharge of duties such as appearing as a witness and giving truthful testimony when subpoenaed.'" 16/

16/ Id., quoting, United States v. Howard, 569 F.2d 1331, 1334 n.4 (5th Cir.), cert. denied, 439 U.S. 834, 99 S.Ct. 116, 58 L.Ed.2d 130 (1978), quoting, United States v. Partin, 522 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977).

Similarly, the district court in United States v. Beatty, 17/

17/ 587 F. Supp. 1325 (E.D.N.Y. 1984).

although bound by Hernandez, reached the same conclusion as the court in Vesich. In Beatty, the defendant was charged with "urging, suggesting and instructing witnesses to give false and misleading testimony before the grand jury and [with] giving disguised and misleading handwriting exemplars in response to orders of the grand jury in violation of 18 U.S.C. § 1503." 18/

18/ Id. at 1329.

Citing Hernandez, the defendant argued that his conduct violated only § 1512, and that the count of the indictment charging him with violating § 1503 should be dismissed.

The court rejected this argument, relying primarily on the legislative history of § 1512. The court concluded:

> [i]t is clear that Congress intended to broaden the protection of witnesses by enacting § 1512. That is not to say, however that it intended to diminish the scope of § 1503 insofar as it aimed at preventing obstruction of justice . . . . It is interesting to note in this regard that § 1512 contains no reference to impeding or obstructing the due administration of justice. 19/

19/ Id. at 1333.

We recognize that Congress ultimately enacted the House version of § 1512, whose history is different from that of the Senate bill, referred to in Beatty. Nonetheless, based on the words of the statute, which appear to be clear, we endorse the result reached in Beatty. Therefore, we find that Wesley was properly charged with both obstruction of justice under § 1503 and with intimidating a witness under § 1512. For the same

reason, we also find the conviction of Cooper under § 1503 not to be beyond the reach of that section.

V.

Cooper's alternative rationale for having this court reverse her conviction is that it was based upon insufficient evidence. Again, construing the evidence in the light most favorable to the government, there were sufficient facts to allow the jury to establish Cooper's guilt beyond a reasonable doubt.

Berry was a potential witness. There is sufficient evidence in the record for a reasonable jury to have found that Cooper visited Berry solely for the purpose of urging her to testify at Wesley's bond hearing that she owned the pawned gun and that she was responsible for Wesley pawning it. Cooper continued to insist that Berry corroborate Wesley's story even after Berry asserted that his version of the facts was incorrect. Even if Cooper did not know that Wesley's story was false when she first suggested that Berry testify, therefore, she certainly should have know of its falsity after Berry repeatedly denied its validity. This evidence is sufficient for a reasonable jury to have found that Cooper acted knowingly or corruptly within the meaning of § 1503. 20/

20/ See United States v. Ogle, 613 F.2d 233, 239 (10th Cir. 1979), cert. denied, 449 U.S. 825, 101 S.Ct. 87, 66 L.Ed.2d 28 (1980).

For these reasons, the decision of the district court is AFFIRMED.

ORIGINAL

Nos. 84-6156 and 84-5249

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

VELMA P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

OSCAR W. WESLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars cumulative punishment at a single trial for separate convictions under 18 U.S.C. 1503 and 18 U.S.C. 1512.

2. Whether the crime of advising a witness to lie in an official proceeding must be prosecuted only under 18 U.S.C. 1512 instead of 18 U.S.C. 1503.

3. Whether the evidence was sufficient to sustain the convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) 1/ is reported at 748 F.2d 962.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1984. The petition for a writ of certiorari in No. 84-6156 was filed on January 24, 1985; the petition in No. 84-6249 was filed on February 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner Wesley was

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1/ "Pet. App." refers to the supplemental appendix to the petition for a writ of certiorari in No. 84-6156, which contains the full text of the court of appeals' opinion. Pursuant to Rule 47.5 of the Fifth Circuit, portions of the opinion that have no precedential value are not published and, accordingly, only excerpts appear at 748 F.2d 962.

convicted of possession in commerce of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1) (Count 1); obstructing justice in violation of 18 U.S.C. 1503 (Count 3); and tampering with a witness, in violation of 18 U.S.C. 1512 (Count 4). Petitioner Cooper was convicted of obstructing justice in violation of 18 U.S.C. 1503. Petitioner Wesley was sentenced to consecutive prison terms of two years on Count 1, five years on Count 3, and five years suspended on Count 4. Petitioner Cooper was sentenced to a suspended five-year prison term.

1. The evidence, as summarized by the court of appeals (Pet. App. 2-3), is as follows. Petitioner Wesley pawned a .38 caliber revolver at the Airline Pawnshop in Baton Rouge, Louisiana and signed the receipt for the gun. After he was arrested on the charge of possession in commerce of a firearm by a convicted felon, Wesley claimed that the pawned pistol belonged to his former step-daughter, Cheryl Berry, and that he signed the receipt at the pawnshop owner's request because Berry was a minor.

Following his arrest, Wesley called petitioner Cooper, his living companion. After receiving the call, Cooper went unannounced to Berry's house and urged Berry to attend Wesley's bail hearing and corroborate his story. In response, Berry said that Wesley's story was false and that she would not attend the hearing. Cooper then told her (Pet. App. 2-3), "I just only telling you * * * what Oscar said * * * [and] Oscar said if you don't go, that he would be out there to talk to you." Berry thought that petitioner Cooper was trying to scare her and she considered Cooper's statement to be a threat.

Rather than attend the bail hearing, Berry stayed at home with the doors locked. Angry that Berry was absent from the hearing, petitioner Cooper told a friend (Pet. App. 3), "the little bitch will testify that it is her gun." About one week after his arrest, petitioner Wesley was released on bail. The

following day he drove slowly past Berry's house honking his horn.

2. The court of appeals affirmed (Pet. App. 1-18). It rejected Wesley's challenges to the sufficiency of the evidence on the firearms and witness tampering charges. The court also rejected the contention that the events involving Berry should have been prosecuted only under 18 U.S.C. 1512. In so ruling, the court recognized that when Section 1512 was enacted in 1982, Section 1503 was amended to delete all references to witnesses; nevertheless, the applicable portion of Section 1503 -- the residual clause proscribing obstruction of justice -- was unchanged and remains applicable to petitioners' conduct.

ARGUMENT

1. Both petitioners contend (84-6156 Pet. 2-4; 84-6249 Pet. 7-8) that their prosecution under Sections 1503 and 1512 violate the Double Jeopardy Clause. 2/ This contention lacks merit.

In a multi-count single trial, the Double Jeopardy Clause bars only cumulative punishment in excess of the limits prescribed by the legislature. Ohio v. Johnson, No. 83-904 (June 11, 1984) slip. op. 6. Under the established standards, it is clear that Congress intended cumulative punishment for separate convictions under Sections 1503 and 1512(a). First, the statutes list separate offenses under separate penalty schemes. See Albernaz v. United States, 450 U.S. 333, 336 (1981). Second, each offense requires proof of an element that the other does not. United States v. Woodward, No. 83-1947 (January 7, 1985). Section 1503 requires proof of the existence of a pending judicial proceeding known to the violator. See Pettibone v. United States, 148 U.S. 197, 205-207 (1893); United States v. Vesich, 724 F.2d 451, 454 (5th Cir.), on rehearing, 726 F.2d 168 (1984); United States v. Johnson, 605 F.2d 729, 730 (4th Cir.

2/ Since Cooper was acquitted on the Section 1512 charge, her judgment of conviction would be unaffected by the resolution of this issue.

1979), cert. denied, 444 U.S. 1020 (1980). Section 1512 contains no similar requirement. On the other hand, Section 1512(a) requires proof that the violator either intimidated, threatened or used physical force or misleading conduct towards another person. Section 1503 does not require this element. Thus, cumulative punishment is authorized at a single trial for separate convictions stemming from one transaction under these statutes. See United States v. Wilson, 565 F. Supp. 1416, 1433 (S.D.N.Y. 1983).

2. Petitioners also contend (84-6156 Pet. 3; 84-6249 Pet. 9-12) that their convictions under Section 1503 were improper because Section 1512 preempts all prosecutions for witness tampering. This contention is without merit.

Prior to its amendment in 1982, Section 1503 read as follows (underlined portions were deleted in 1982):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more that $5,000 or imprisoned not more than five years, or both.

In cases decided under that statute, the courts consistently recognized that a request to a witness to testify falsely in

official proceedings constituted obstruction of justice within the Section's residual clause. See, e.g., United States v. Vesich, 724 F.2d 451, 455-456 (5th Cir. 1984); United States v. Friedland, 660 F.2d 919, 930 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982); United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); Falk v. United States, 370 F.2d 472, 475-476 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

When the Victim and Witness Protection Act, 18 U.S.C. 1512, was enacted, 3/ Congress deleted all references to witnesses from Section 1503. Congress did not, however, alter the residual clause of Section 1503 in any way. When Congress amends part of a statute but leaves another part intact, the two provisions are given "as full a play as possible." Markham v. Cabell, 326 U.S. 404, 411 (1945). Thus, by leaving the residual clause of Section 1503 untouched, Congress in effect ratified the judicial interpretations of that clause that reached the conduct of asking a witness to lie in official proceedings. This construction is reasonable because Sections 1503 and 1512 are directed at different goals: Section 1503 guards against the corruption of judicial proceedings (by whatever method) whereas Section 1512 protects witnesses.

Contrary to petitioners' contention (84-6156 Pet. 3; 84-6249 Pet. 9), it is not clear that the decision below conflicts with the decision of the Second Circuit in United States v. Hernandez,

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3/ Section 1512 provides in pertinent part:

> (a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person with intent to-
>
> (1) influence the testimony of any person in an official proceeding;
>
> * * *
>
> Shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

730 F.2d 895 (1984). In Hernandez, the defendant was convicted of threatening a witness in order to obtain documentary evidence, in violation of Section 1503. The court of appeals vacated his conviction under Section 1503 but there is some ambiguity in its opinion. The court states at one point that Congress "intended to remove witnesses entirely from the scope of § 1503" (730 F.2d at 898) and elsewhere in its opinion that "Congress intended that intimidation and harrassment of witnesses should thenceforth be prosecuted under § 1512 and no longer fall under § 1503" (id. at 899). Since the facts in Hernandez involved intimidation, the court's narrower statement is its holding. Accordingly, not until the Second Circuit has occasion to consider the issue in a case where a witness is asked to lie -- without intimidation or harrassment -- will its full reading of the relevant statutes be known. See United States v. Beatty, 587 F. Supp. 1325 (E.D.N.Y. 1984) (permitting prosecution under Section 1503 for urging witnesses to give false testimony to grand jury and for providing misleading handwriting samples to grand jury); United States v. King, 597 F. Supp. 1228 (W.D.N.Y. 1984) (asking informant to lie to authorities does not violate Section 1512).

In the meantime, the parameters of any potential conflict among the circuits remain hazy; indeed, the conflict may well be resolved as the lower courts have further experience with the legislation passed in 1982. See e.g. United States v. Lester, 749 F.2d 1288 (9th Cir. 1984).

3. Petitioners also contend (84-6156 Pet. 3; 84-6249 Pet. 13-18) that their convictions are not supported by the evidence. These factbound questions do not merit further review.

The jury had ample evidence from which to conclude that petitioner Cooper urged Berry to lie at petitioner Wesley's bail hearing. Although Cooper contends that all she did was tell Berry to tell the truth, the jury reasonably could have concluded that Cooper's insistence that Berry corroborate Wesley's story after Berry said it was untrue was intended to encourage Berry to

testify falsely. Similarly without merit are Wesley's arguments (84-6249 Pet. 13-15): (1) that he could not have threatened Berry because he was incarcerated, and (2) that Cooper did not threaten Berry as evidenced by the jury's acquittal of her on that charge. Wesley could properly be convicted as an aider and abettor to the threat despite his incarceration when the crime occurred. United States v. Garrett, 720 F.2d 705, 713 (D.C. Cir. 1983), cert. denied, No. 83-6067 (Feb. 21, 1984); United States v. Molina, 581 F.2d 56, 61 & n.8 (2d Cir. 1978). His conviction is unaffected by the jury's acquittal of Cooper. See United States v. Powell, No. 83-1307 (Dec. 10, 1984); Standefer v. United States, 447 U.S. 10 (1980); Dotterweich v. United States, 320 U.S. 277 (1943). 4/

4. Petitioner Wesley also contends (84-6249 Pet. 16-18) that the evidence fails to support his conviction for possession of a firearm by a felon. As the court of appeals stated (Pet. App. 5-7) the evidence showed that R.G. Industries manufactured the pistol in Miami, Florida, in 1974 and then shipped it to Jackson, Mississippi. The pistol was a "firearm" because it was designed to expel a projectile by an explosive. The pawnshop owner examined the pistol when Wesley pawned it and determined that it was working properly. Although the pawnshop owner erroneously copied the serial number of the pistol as "0054616" instead of "Q054616", a Bureau of Alcohol, Tobacco and Firearms agent examined the pistol pawned by Wesley and determined that the tail of the "Q" was worn and resembled an "O" (Tr. 71-72, 96). These facts, taken in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942), amply established that petitioner Wesley, a prior felon, possessed a firearm that had been in interstate commerce.

4/ The jury might have determined that Cooper failed to understand fully that her message to Berry was a threat, but that Wesley understood its full meaning. Accordingly, the jury's verdicts are consistent.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985

SUPREME COURT OF THE UNITED STATES

84-6156 VELMA P. COOPER
v.
UNITED STATES

84-6249 OSCAR W. WESLEY
v.
UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 84-6156 AND 84-6249. Decided May 28, 1985

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Before 1982, 18 U. S. C. § 1503 prohibited influencing or intimidating "any witness in any court of the United States," or any juror or court officer in the discharge of his or her duty. The section also contained a residual clause forbidding anyone from obstructing or attempting to obstruct the "due administration of justice." In 1982, Congress amended § 1503 to remove all references to witnesses. At the same time, it enacted the Victim and Witness Protection Act, 15 U. S. C. § 1512, addressed specifically to protecting witnesses, informants and crime victims from harassment and intimidation. Congress did not, however, remove from § 1503 the residual "obstruction of justice" clause.

Petitioners in these cases were charged with violating both § 1503 and § 1512 by attempting to influence a witness to testify falsely. They argued that such conduct could no longer support a conviction under § 1503, because § 1512 was now the only statute covering witness tampering. The Court of Appeals for the Fifth Circuit rejected this contention and affirmed petitioners' convictions under § 1503, rea-

soning that certain kinds of witness tampering could still be reached under the provision's "obstruction of justice" clause. 748 F. 2d 962 (1984). The court observed that § 1512 did not proscribe "urging and advising" a witness to testify falsely, which was the conduct that was charged to have violated § 1503 in this case. If urging a witness to commit perjury was not prohibited by § 1512, and if witnesses had been removed entirely from the scope of § 1503, the conduct with which petitioners were charged would violate neither section. The Court of Appeals saw no indication that in enacting § 1512 to broaden witness protection, Congress had intended to create such a gap.

In reaching this result, the Court of Appeals explicitly rejected the reasoning of *United States* v. *Hernandez*, 730 F. 2d 895 (CA2 1984). In that case, the Second Circuit vacated a conviction under § 1502 that was based on witness intimidation. Reviewing the language and legislative history of §§ 1503 and 1512, the court held that Congress "affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.*, at 898. The argument that the residual clause of that statute still covered witness harassment, the court stated, "def[ied] common sense." *Id.*, at 899.

The Courts of Appeals of two large circuits have thus arrived at contrary interpretations of an important criminal statute. I would grant certiorari in these cases to resolve the conflict.